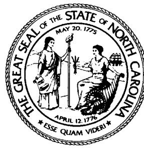

SUPLR 2012-0031

North Carolina Department of Revenue

Beverly Eaves Perdue
Governor

David W. Hoyle
Secretary

November 7, 2012

Account ID: [redacted]
FEIN: [redacted]

[redacted]
[redacted]
[redacted]

Attention: [redacted]

Re: Private Letter Ruling Request

Dear Ms. [redacted]

We have your letter dated August 16, 2012, submitted subsequent your meeting with Mr. [redacted] [redacted], Revenue Field Audit Supervisor of the [redacted] NC office, requesting that we issue a private letter ruling to support your practices in case of audit questions for [redacted] [redacted]. ([redacted]) and related entities (Exhibit A). We are aware that you and other individuals previously discussed the operations and your request for a private letter ruling with Secretary of Revenue, [redacted] [redacted] Chief Operating Officer, [redacted] [redacted] [redacted] and former Assistant Secretary of Tax Compliance, [redacted] [redacted] during a meeting in Secretary [redacted]'s office on July 17, 2012.

It is important to note that copies of representative documents executed between each legal entity and customers of each legal entity have not been provided and considered for purposes of this response. Our response is based on the information provided in your letter, email and attachments, information obtained by Mr. [redacted] during a visit, and our review of various tax returns filed by the entities.

In an email dated July 16, 2012 to [redacted], Executive Assistant to the Secretary and Chief Operating Officer, you state "[you] are seeking clarification re how to handle sales and use tax payments to the state of North Carolina for [redacted] and affiliated companies." You advise, "we sell materials to 12 separately incorporated [redacted] installation (contractor) offices in North Carolina plus 1 in [redacted] and 1 in [redacted] We also sell to [redacted] and [redacted] in [redacted] (also installation offices)." You further state "prior to an audit in [redacted] in 2005 all [redacted] installation offices were reporting sales tax to the state individually. The [redacted] audit in 2005 changed this by classifying [the] installation offices as end users and [redacted] as a distributor. Since 2005, [redacted] pays sales tax to the state when [it sells and delivers] materials to one of the [installation] offices and [it designates the tax] to the county in which [the] installation office is located and where the material is delivered, not where the material is installed since [the] installation offices are the end users."

A copy of the an attachment to your email of July 16, 2012 titled Sales & Use Tax Meeting July 17, 2012 (Meeting Document) was also provided for our review. The proposal contained in the

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Meeting Document states the following:

> "We propose that [REDACTED] of [REDACTED] charges [s]ales [t]ax to all our NC offices for all materials received from our office in [REDACTED] and remit based on the county in which the office is located with respect to the definition that our installation offices are the end users of the materials and not the customer receiving the installation. For all material sales, we would like [the installation offices/related entities] to turn in a 'Sales tax report' to [REDACTED] of [REDACTED] and we will charge them the appropriate tax for those items whether they were purchases for use or [sold to] a customer as a material sale. [You] attached a sample form that [REDACTED] [REDACTED] would ask each office to fill out. The process would negate any [installation offices/separate entities] from having to have their own sales tax account with the state and would prevent the State from having to process 14 additional sales tax account reports each month."

Sales and Use Tax Technical Bulletin Section 31-1.A. states in part, "[w]hen a contractor or subcontractor makes taxable purchases of tangible personal property for use in this State from a supplier outside this State who does not collect the applicable State tax and any local sales or use tax thereon, such contractor or subcontractor must remit the tax directly to the Department." N. C. Gen. Stat. § 105-164.6(b) states "[t]he tax imposed by this section is payable by the person who purchases, leases or rents tangible personal property or digital property or who purchases a service." N.C. Gen. Stat. § 105-228.90(5) defines the term "person" as "[a]n individual, a fiduciary, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government or another group acting as a unit." Each entity is required by statute to report and pay any applicable use tax due on its purchases individually to the Department. The North Carolina sales and use tax statutes do not grant an option for related or multiple entities to file a combined sales and use tax return. In the event you change your business practices and implement a procedure in which one entity is responsible for making all purchases from third party sources, then payment of use tax to the Department by one entity would be proper. The direction you received for the [REDACTED] Inc. of [REDACTED] and noted in the Meeting Document is correct. Additionally, the local tax due on purchases of tangible personal property is based on the location where the [REDACTED] entity takes title to the items. If the items are delivered to the [REDACTED] entity at the location of the [REDACTED] entity's customer, the local rate of tax is due based on the delivery location. If the items are delivered to the [REDACTED] entity at the [REDACTED] entity installation location, tax is due based on the installation entity address.

We note in the Meeting Document that you state for offices who do work in other states, "[o]n these jobs, they request a credit for the sales tax paid in North Carolina from [REDACTED] of [REDACTED] and they pay it in the respective state on their individual sales tax report in that state." [REDACTED]'s sales of tangible personal property of materials to other [REDACTED] entities that operate as contractors where such entities take title to the property within this State are subject to North Carolina State and local sales tax based on the delivery location, notwithstanding that the property may be used outside of North Carolina in performance of a contract. The other [REDACTED] entities that operate as contractors should not seek a refund or credit of the North Carolina State and local sales and uses taxes paid to [REDACTED] of [REDACTED] The other state in which the contact is performed will likely afford credit for the North Carolina State and local sales taxes that were properly paid. In the event [REDACTED] of [REDACTED] and [REDACTED] (installation offices) take title of products in the State, North Carolina State and local sales and use tax is applicable on the sales price of such items. North Carolina does not exempt sales of products to contractors where title is taken in North Carolina notwithstanding that the items may be for use in fulfilling a contract in another state.

In the email of July 16, 2012 you state "[a]ll the installation offices do sell some material only orders to some customers. Such material sales amount to 2% of our total sales for the installation offices." You state in the Meeting Document that "[i]f a NC office sales a material sale over $300 they send the paperwork and check to and let those sales run through of Sales under $300 are considered casual and isolated sales per the previous Sales Tax Audit (as a commission sale and are not remitting the sales tax on the profit." N. C. Gen. Stat. § 105-164.3(1k) defines business as "an activity a person engages in or causes another to engage in with the object of gain, profit, benefit, or advantage, either direct or indirect. The term does not include an occasional and isolated sale. . . ." Based on our review of prior examinations for a number of the other entities, while the total materials sales (retail sales) other than sales made by may only amount to 2% of total sales for installation offices as noted in your letter, it appears that the entities (installation offices) make regular sales of tangible personal property. As it relates to material sales, there is not a statutory dollar amount that classifies transactions under $300 as casual and isolated sales and therefore considered a commission sale and not subject to sales tax. If the material sales are billed by and reported for income tax purposes by such entity, any sales tax due on the sales price should be remitted to the Department by However, should not deduct from the total sales tax due on retail sales of material, the amount of sales tax paid on the purchase price of the items by another entity at the time of purchase from

If you wish to pursue credit for taxes paid by the related entities (installation offices) to or other vendors for property subsequently sold at retail, each related entity must report and remit the sales tax on the material sales on its individual sales and use tax return. The tax paid on the purchase price of property at the time of purchase by the related entities that is subsequently resold may be deducted as a credit on the sales and use tax return. It is imperative that documentation to support any credit taken on a sales and use tax return is attached to each return for each entity. We understand that the companies are related and/or have shared or partial ownership; however, the sales tax statutes do not permit the filing of a combined sales and use tax return. N.C. Gen. Stat. § 105-164.4(c) provides that "[b]efore a person may engage in business as a retailer or a wholesale merchant, the person must obtain a certificate of registration from the Department. . . ."

In the Meeting Document, you state ' and currently pay no sales tax upon purchase of materials. They charge the customer sales tax based on the county in which the fence is installed so they remit the sales tax within the month that the job or material sale is invoiced." Mr. also communicated that Mr. recently obtained partial ownership in these two companies. We do not have sufficient information to determine if these two entities operate in the same manner as the related entities. Additionally, you have not indicated whether all materials and other items are purchased from In the event the two entities operate in the same manner as the entities and enter into performance contracts to install fencing, it is reasonable that the entities would pay tax at the time of purchase in lieu of charging sales tax to customers. Sales and Use Tax Technical Bulletin 31-1 A. states in part, "[i]n order to establish if a transaction constitutes a performance contract, the tenor of the agreement is for the contractor to perform a job, retaining the right to control the means, the method, and the manner of accomplishing the desired result. A performance contract does not provide for a sale of specific items; rather, the contractor agrees to furnish the necessary materials, labor, and expertise to accomplish the job. With a performance contract, responsibility for the job and title to the materials purchased by the contractor remain with the contractor until the job is completed and accepted by the purchaser/owner. The contractor is liable for accidents or injury at the job site and loss or damage due to vandalism, neglect, theft, and fire. and each may wish to pursue a private letter ruling pursuant to the Private Letter Ruling Policy available on the Department's

website and pay the applicable fee in order to receive a written response based on the facts of each entity.

Please note that Sales and Use Tax Technical Bulleting 31-1 C. provides “the term ‘retailer-contractor’ shall mean any person who engages in the business of selling building materials, supplies, equipment and fixtures at retail and, in addition to such business, enters into contracts for constructing, building, erecting, altering or repairing buildings or other structures, and for the installation of equipment and fixtures to buildings and, in the performance of such contracts . . . consumes or uses such materials or merchandise.” In the event any of the entities operate a retail establishment, maintains an inventory and makes regular over the counter sales, such entity likely would be deemed to be operating as a retailer-contractor. A retailer-contractor is liable for remitting, directly to the Department, tax on the sales price of any tangible personal property sold at retail, and tax on the purchase price of any tangible personal property used in a performance contract. In such instances, the retailer-contractor must remit the local rate of tax on the purchase price of tangible personal property used in the performance contract based on the location in which the tangible personal property is installed and not the location of (installation office). Additionally, the entity must complete the county breakdown section of the paper or electronic return to ensure proper reporting of the tax to the correct local jurisdiction.

In summary, each entity that purchases tangible personal property must report and pay its own applicable use tax and should not submit copies of the purchase invoices to if each entity deducts the expenses for income tax purposes. Additionally, each entity that makes retail sales of material is the retailer responsible for collecting and remitting sales tax to the Department. The North Carolina sales and use tax statutes do not permit the filing of a combined sales and use tax return for related entities.

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

If you have any questions, you may reach me at the number listed below.

Very truly yours,

, Director
Sales and Use Tax Division

cc: , Secretary
, Chief Operating Officer
, Director of Examinations
, Revenue Field Audit Supervisor –

Enclosure

Exhibit A – Companies